Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

No. 97-2

In The

Supreme Court of the United States

October Term, 1996

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

GENERAL CIRCUIT BREAKER & ELECTRIC SUPPLY INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION OF RESPONDENTS, PANELBOARD SPECIALTIES WHOLESALE ELECTRIC, INC., AND JAIME A. CONTRERAS, TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

First Question Presented For Review:

Whether the opinion of the Court of Appeals for the Ninth Circuit conflicts with the decision of the Court of Appeals for the Eleventh Circuit in *Babbit v. Dynascan*.

Second Question Presented For Review:

Whether the remedies for trademark counterfeiting require, as a precondition, establishment of trade infringement pursuant to 15 U.S.C. § 1114.

Third Question Presented for Review:

Whether the correction by the United States District Court of an erroneous jury instruction by order rather than new trial was justified by principles of issue preclusion.

PARTIES TO THE PROCEEDINGS

Petitioner, Westinghouse Electric Corporation, is a publicly traded corporation, that has numerous non-wholly owned subsidiaries. A list of these non-wholly owned subsidiaries appears in the Rule 29.6 Listing in Westinghouse's Petition for Writ of Certiorari.

Respondents are General Circuit Breaker & Electric Supply, Inc., Pencon International, Inc., dba General Magnetics/Electric Wholesale, Panelboard Specialties Wholesale Electric, Inc., Xavier Contreras, the Estate of Charley Contreras, and Jaime A. Contreras.

AC Circuit Breaker-Electric Supply, Inc. and Joe A. Contreras, both of whom were defendants in the district court, were parties to the proceedings at the Court of Appeals when the appeal was docketed, but settled with Westinghouse prior to the resolution of the appeal, and were not parties to this litigation at the time of the Ninth Circuit judgment.

RULE 29.6 LISTING

None.

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OPPOSITION OF RESPONDENTS, PANELBOARD SPECIALTIES WHOLESALE ELECTRIC, INC., AND JAIME A. CONTRERAS, TO PETITION FOR WRIT OF CERTIORARI

Respondents, Panelboard Specialties Wholesale Electric, Inc., and Jaime A. Contreras, respectfully request this Court deny Petitioner Westinghouse Electric Corporation's petition for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *Petition for Writ*) is reported at 106 F.3d 894. The Order of the Court of Appeals denying the petition for rehearing with suggestion for rehearing en banc appears at the end of the published opinion (App. A, *Petition for Writ*). The opinion of the District Court correcting instructional error on Westinghouse's trademark counterfeiting claim and ordering entry of judgment in favor of respondents (App. B, *Petition for Writ*) is reported at 852 F.Supp. 883.

JURISDICTION

Respondent does not contest the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

The applicable provisions of the Lanham Act, as amended by the Trademark Counterfeiting Act of 1984, are 15 U.S.C. §§ 1114, 1116 and 1117. These provisions, as amended, are reprinted in their entirety in Appendix C of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The matter on which Westinghouse Electric Company (hereafter "Petitioner") seeks this court's attention is an example of what the combined efforts of some of the largest corporations in the world can accomplish to destroy the business of their infinitely smaller competitors. In June 1988, Square D Company (hereafter "Square D") brought an action against a group of small reconditioners of molded case circuit breakers claiming trademark infringement and unfair competition. This action was based on the actions of former defendants who had made intentional misrepresentations to nuclear power plants as to the condition of reconditioned circuit breakers they were selling. Instead of limiting Square D's action to the parties who had performed these illegal acts, Square D determined that it would commence legal proceedings against a whole group of small west coast reconditioners of circuit breakers. Some of these small business defendants determined that regardless of the merits of their defenses, settlement would promote continued business relationships with Square D distributors and allow them to continue their business operations. Square D's

counsel negotiated these settlements and then immediately turned around and served additional lawsuits on the settling defendants on behalf of Petitioner, General Electric Company, and Underwriters Laboratories, Inc. The four plaintiffs additionally brought legal proceedings in Nov. 1988 against other small reconditioners located in the Southern California area, including these respondents, Panelboard Specialties Wholesale Electric, Inc. and Jaime A. Contreras (hereafter "PBS"). Utilizing the same law firm and alleging the same facts, these mega firms set their sights not on the party making false representations, but on the largest and most visible segment of the reconditioning industry, the Contreras family of Southern California.

The replacement circuit breaker industry, including molded case circuit breakers, was pioneered by two brothers: Charley and Art Contreras. Recognizing a market opportunity created by the manufacturers' efforts at planned obsolescence, the Contreras brothers developed a business that filled the consumer's need for replacement of older circuit breakers.

Circuit breakers were generally manufactured to fit into some sort of electrical enclosure such as a panelboard or switchboard. As the manufacturers of molded case circuit breakers made changes to their products, they changed not only the electrical characteristics but also the physical configuration of the molded case circuit breakers. Over time, the installed base of electrical equipment begins to deteriorate, requiring replacement of older circuit breakers. Where building owner's attempt to upgrade or expand existing electrical equipment, replacement or addition of older styles of circuit breakers is

necessary. Because of substantially lower or eliminated production of older circuit breakers, such replacement is difficult or perhaps even impossible.

It was in this growing market that the Contreras brothers made their mark. The Contreras obtained new and used surplus circuit breakers from building construction sites, unused distributor over inventory, inventory liquidations, government auctions of new and used surplus, demolition sites and their extensive network of contacts within the circuit breaker manufacturing and distributing industry.[1] Large inventories of new and used molded case circuit breakers were obtained and warehoused for future sale.

The initial business established by Charley and Art Contreras was founded in 1957 and was known as Industrial Marine. As a family business, their sons were raised working in the business sweeping floors, storing circuit breakers, dusting circuit breakers and, as they grew older, learning to recondition and finally to sell new and reconditioned circuit breakers. In 1975, the brothers dissolved their business, and Charley started General Magnetics Electric Wholesale later incorporated as Pencon International (hereafter "GMEW"). Charley's sons, including Jaime and Xavier, worked for Industrial Marine, later for GMEW, and then eventually formed their own companies, PBS and General Circuit Breaker and Electric Supply, Inc. (hereafter "GCB"), respectively. These two sons, and other family members who established their

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[1] Primarily Westinghouse, General Electric, Square D Company and their wholly owned or authorized distributors.

own businesses, continued the family tradition of obtaining stocks of new and used surplus circuit breakers and reselling them, often after reconditioning them.

Prior to the commencement of this litigation, PBS was a prospering and fast-growing small business. After Jaime left the employ of his parents and with significant experience in the reconditioning industry and as an electrician and electrical maintenance professional, Jaime and his wife established their business in 1984. PBS experienced rapid growth both in inventory and business until becoming the subject of this lawsuit and the surrounding negative publicity campaign created by the combined plaintiffs, including Petitioner.

PBS's operations were based on Jaime's vast experience. Over the course of many years of working with circuit breakers, Jaime Contreras is familiar with not only circuit breakers of all models and manufacturers, but also the variations within models of circuit breakers. He personally trained and supervised the reconditioning and sales activities at PBS. Based upon extensive experience, experimentation, and reconditioning of molded case circuit breakers, PBS determined that the product sold by Petitioner and its co-plaintiffs and certified by plaintiff, Underwriters Laboratories, Inc., is frequently improperly manufactured both in the assembly process and through use of improper or faulty parts.

PBS's business consisted of supplying the customer's need for replacement for older circuit breakers, including by reconditioning where a circuit breaker was determined to require reconditioning either as a result of faulty manufacturing or as a result of the condition of the

breaker, PBS would clean and inspect the circuit breaker, replace faulty, missing or worn parts, as required, with new or salvaged parts, and lubricate and test the reconditioned circuit breakers. Where necessary, PBS would recalibrate the breakers thermal function.

Most circuit breakers are designed with interchangeable calibration. Amperage calibration is appropriate within limits. It is experience and knowledge of circuit breakers that allows proper changes to be made where a circuit breaker was manufactured with adjustable amperage ratings or several voltage ratings. PBS would, on rare occasions, recalibrate and re-rate a circuit breaker within the manufacturer's published tolerances.

PBS also filled the customer's need for usable replacements for older circuit breakers by properly labelling the circuit breakers. Where a circuit breaker, regardless of its condition, had destroyed or illegible labels replacements were made from photocopies of original labels to provide the customer with important information contained on the labels such as manufacturer, model, rating information and application information. These labels were placed on the circuit breakers only for the purpose of providing information important for the use and identification of the circuit breakers. Where a circuit breaker was reconditioned and the original labels were in a condition to leave on the circuit breaker or original labels included in the label configuration a UL label, such labels remained on the reconditioned circuit breakers.[2]

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[2] The UL mark means only that at the time the product left the original manufacturing facility the original circuit breaker

PBS's customers, to whom it sold both reconditioned and new circuit breakers, were sophisticated purchasers of electrical equipment. Purchasers were primarily electricians, electrical maintenance professionals and electrical distribution sales professionals, including employees and authorized distributors of each of the plaintiffs, including Petitioner. These sophisticated customers contacted PBS because they were unable, either altogether or within their time requirement, to obtain the hard to find and obsolete equipment sold by PBS. Customers frequently learned of PBS from employees of Petitioner who recommended PBS for hard to find equipment both before and after this lawsuit was filed.

PBS customers were aware of the condition of the circuit breakers that PBS was selling. Initial telephone customers were generally directed to Jaime Contreras himself. Jaime would explain who PBS was and the types of products it sold. Jaime also determined personally the persons and firms with which he was doing business were sufficiently knowledgeable with application or sale of circuit breakers to prevent sale to someone who would misinstall a breaker because of lack of basic understanding. Second, PBS notified its customers and potential customers on all advertising materials that it sold reconditioned circuit breakers. These advertising materials included line cards, flyers, business cards, invoices, signs, promotional pens, coffee cups and caps. All indicated that PBS sold reconditioned circuit breakers.

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design was tested to meet UL standards and the representative samples of the circuit breakers were tested to confirm compliance of the samples with UL standards.

Most importantly, PBS employees and customers testified that PBS disclosed the condition of the circuit breakers verbally when sales were made. Despite the most herculean efforts, Petitioner was unable at trial to show even a single instance where PBS failed to disclose the condition of a reconditioned circuit breaker it sold.

In the initial trial the jury concluded that PBS acted in good faith and without the intent to deceive or cause confusion. (Westinghouse brief 12b.) Petitioner's efforts to cast aspersions on the actions of PBS and cast its business as evil and illegal cannot overcome this finding.

Despite Petitioner's reference to Square D's ex parte seizures, no seizure order was ever obtained with regard to PBS. In fact the request by Petitioner and its co-plaintiffs for such an order was denied. Square D's seizure, executed as against one defendant, is the subject of a pending wrongful seizure claim. Settlement of claims against other defendants included return of the inventory seized because it was neither counterfeit or infringing.

Petitioner makes veiled reference to criminal actions as against the defendants. Petitioner fails to clarify that Petitioner, its co-plaintiffs, and attorneys were the driving force behind the criminal investigations. Of the three resulting indictments, none were as to the defendants before this court. One conviction was the result of guilty pleas of the defendants who were originally discovered to have made affirmative false representations as to the condition of the circuit breakers they sold. One former defendant was indicted on 58 criminal counts relating to its sale of reconditioned circuit breakers. Following trial by jury in which the U.S. attorney was actively assisted

by counsel for Petitioner, the former defendant was found innocent of all 58 counts. One other former defendant who had seen the financial ruin experienced by his brother in obtaining an innocent verdict, chose to accept a plea agreement, including a guilty plea, in exchange for a small fine paid $10 per month and a few weekends at home, less than a slap on the wrist.

Petitioner also fails to note that the criminal investigations which it and its co-plaintiffs initiated resulted in a determination that Petitioner had knowingly and falsely represented the condition of reconditioned molded case circuit breakers to a nuclear power facility. This evidence, relied upon in part by the jury in determining that Westinghouse was guilty of unclean hands in the District Court, for some unexplained reason was not the subject of criminal indictments against the Petitioner who helped orchestrate the investigations.

PBS denied the claims of Petitioner and further asserted statutory equitable affirmative defenses. Following a lengthy trial, the jury was instructed and received a verdict form. After three and one-half days of deliberation, the jury requested clarification of the jury instructions. The District Court declined the jury's request. The jury returned its first verdict form. This form was hopelessly inconsistent and was amended the following day by the jury. Even with amendments, the District Court was perplexed by the inconsistency between the evidence presented and the conclusions set forth on the jury verdict forms. Following objection by the defendants, briefing and oral argument, the District Court issued its opinion. The Ninth Circuit having affirmed the District Court's judgment, Petitioner seeks Writ of Certiorari.

REASONS FOR DENIAL OF WESTINGHOUSE'S PETITION AS TO ITS FIRST QUESTION

THE OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN *BABBIT V. DYNASCAN*.

In support of their petition, Petitioner points to the opinion of the Eleventh Circuit in *Babbit Elec., Inc. v. Dynascan Corp.*, 38 F.3d 1161 (11th Cir. 1994) and asserts that a conflict exists between the *Babbit* court and the Ninth Circuit opinion. In fact, no such conflict exists. Both the Ninth and Eleventh Circuits apply the Lanham Act and the Trademark Counterfeiting Act amendments thereto in the same manner and using the same analytical process. The differences in outcome are a result of the application of the statutory framework to the facts of each case rather than a conflict in law.

In *Babbit*, Dynascan and Babbit entered into an agreement authorizing Babbit to sell certain models of cordless telephones in Latin America under Dynascan's Cobra trademark. (*Id.* at p. 1173.) Babbit was required to pay a royalty for use of the mark. (*Id.* at p. 1174.) Though from time to time the model of telephone on which the mark was placed changed, Dynascan would inspect any new model prior to use of the mark on that model. (*Id.* at p. 1174.) Without permission or knowledge of Dynascan, Babbit ordered over 14,000 telephones of a different model. Dynascan placed Cobra labels on the telephones and did not pay royalties for use of the mark. Babbit, together with the manufacturer of the unapproved telephone, arranged for the placement of the unauthorized labels on the unapproved telephones from their Florida

offices. The court found that Babbit and its co-defendants intentionally used the Cobra trademark on telephones that were not and had never been authorized by Dynascan. (*Id.* at p. 1176.) "Babbit intended to improve sales of MCE telephones [the unapproved model] by relabeling them with Cobra labels because Babbit was having difficulty selling MCE telephones. (*Id.* at p. 1179.)

The court concluded from the facts that Babbit's use of the trademark without authorization was "likely to cause confusion, mistake or to deceive customers into believing that the SA-660s cordless telephones are licensed, authorized, sponsored or approved by Dynascan. In addition, B SA-660s cordless telephones are likely to cause consumers to confuse the Cobra SA-660s, an unapproved or unauthorized product, with the Cobra SA-620s, an approved product and authorized product." (*Id.* at p. 1176.) The court determined that through its breach of the licensing contract Babbit had intentionally infringed the trademark rights of Dynascan. (*Id.* at p. 1179.) Babbit unsuccessfully disputed the findings with regard to likelihood of confusion and contested jurisdictional authority to hear Dynascan's claims.

Babbit also raised the affirmative defense of abandonment. Other counterfeiters were selling into the same market without legal action by Dynascan. The court found this affirmative defense to be without merit.

Having determined that Babbit was liable for trademark infringement pursuant to 15 U.S.C. 1114, the court considered the issue of counterfeiting. With a foundation of trademark infringement as a pre-condition, the court turned to the issue of whether Babbit "intentionally used

a mark, knowing such mark is a counterfeit mark." 15 U.S.C. at 1117(b).

Because Babbit had entered into an agreement that provided for the proper use and application of the trademark and because Babbit knew that the right to apply the trademark did not extend to any products which were obtained outside of the agreement between Babbit and Dynascan, the court concluded that Babbit had knowledge that the telephones to which it affixed Dynascan's marks were not Dynascan's telephones. Consequently, it was clear that Babbit used Dynascan's trademarks knowing that they were counterfeit. (*Id.* at 1181.)

The Ninth Circuit's analysis followed exactly the same process as *Babbit*. Though the Ninth Circuit focused on issues relating to the affirmative defenses, its analysis assumed the foundation of likelihood of confusion and violation of 15 U.S.C. 1114. The court stated "Westinghouse did establish its claim for trademark infringement based on the defendants' conduct in selling reconditioned breakers bearing the Westinghouse trademark." Petition for Writ 14a.[3]

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[3] PBS contends that this finding was based on erroneous jury instructions from which it could not appeal because of the favorable result. While PBS does not wish to contest a judgment in its favor, it does not believe that a jury properly instructed would have returned a verdict form establishing trademark infringement. This position was confirmed by a letter received by the trial judge from one of the jurors following the jury's release to the effect that the jury wished to see the defendants cleared of the damages claim. See footnote 20 to District Court Opinion, page 16b of Petition for Writ.).

With the foundation of a finding of trademark infringement the Ninth Circuit began its lengthy analysis of the affirmative defenses and their relationship to what both the District Court and the Ninth Circuit determined to be the erroneous and now infamous Instruction 65. The opinions of the District Court and the Ninth Circuit both determined that PBS had established facts necessary to support its affirmative defenses of laches, acquiescence, estoppel and unclean hands as to Petitioner's 15 U.S.C. 1114 claim. As stated by the Ninth Circuit, the trademark infringement claim "was overcome by the defendants' affirmative defenses." 14a.

With a finding that the trademark claim was defeated by establishment of the affirmative defenses, the Ninth Circuit had no need to go any further in its counterfeiting analysis. Had the *Babbit* court found the existence of any affirmative defense or any failure of the trademark infringement, its analysis would have ceased with the failure of an essential element of trademark counterfeiting. In this case, that's exactly where the Ninth Circuit concluded its analysis. Without a successful underlying trademark infringement claim, there can be no trademark counterfeiting.

THE REMEDIES FOR TRADEMARK COUNTERFEITING REQUIRE, AS A PRECONDITION, ESTABLISHMENT OF TRADE INFRINGEMENT PURSUANT TO 15 U.S.C. § 1114.

Petitioner demonstrates a fundamental misunderstanding of the statutory framework for recovery for trademark infringement pursuant to the Lanham Act.

Petitioner seems to assert that the Trademark Counterfeiting Act established a new civil cause of action for trademark counterfeiting designed to counteract ineffective remedies under the existing Lanham Act. Yet careful examination of 15 U.S.C. 1116 and 1117 reveal that the Trademark Counterfeiting Act simply adds remedies for certain forms of trademark infringement prohibited pursuant to 15 U.S.C. 1114, conditioned upon proof of additional facts. Regardless of the additional elements of proof required as a prerequisite to the additional remedy for trademark counterfeiting, to prevail a plaintiff must establish foundational liability pursuant to section 1114.

Petitioner's complaint included claims for trademark infringement pursuant to two federal statutes. Petitioner's second claim sought relief pursuant to 15 U.S.C. 1125 claiming unfair competition in the use of trademarks on circuit breakers. The first claim for relief was specifically brought pursuant to 15 U.S.C. 1114 for trademark infringement seeking injunctive relief and the remedy provided in 1117(b) for treble damages and attorney's fees for intentionally fraudulent, malicious, wilful and wanton conduct. Despite representations contained in its petition, nowhere in its complaint did Petitioner even bother to seek the special relief it now claims is available under the Trademark Counterfeiting Act.

Both sections 1116 and 1117 make clear that a finding of liability for trademark infringement pursuant to section 1114 is a prerequisite for any determination under the Trademark Counterfeiting Act. To obtain counterfeiting remedies, it is also necessary to establish that the defendant intentionally used a counterfeit mark, knowing it to be counterfeit. Even Petitioner recognizes that the

additional remedies of the Trademark Counterfeiting Act only apply where there is a viable violation of Section 1114(1)(a). (Petition for Writ, page 13.)

Section 1116 provides the authority to issue ex parte orders for the seizure of goods and counterfeit marks, but requires foundationally the existence of a claim for trademark infringement. In order to obtain seizure orders, not only must a plaintiff allege trademark infringement pursuant to 15 U.S.C. 1114 and counterfeiting but Plaintiff must also comply with all procedural safeguards and standards necessary to obtain ex parte relief. Petitioner was unsuccessful in obtaining this remedy as to any defendant in this action.

15 U.S.C. 1117 allows recovery for treble damages and attorney's fees for a particular subset of the trademark infringement pursuant to 15 U.S.C. 1114. These remedies are only available upon establishment of a trademark infringement claim and the additional burden of proving use of a counterfeit with knowledge of the counterfeit.

Petitioner failed in its efforts to obtain these remedies because it failed to establish the infringement. The affirmative defenses acted as a complete bar to any recovery by Petitioner.

REASONS FOR DENYING THE PETITION AS TO PETITIONER'S SECOND QUESTION

CORRECTION BY THE UNITED STATES DISTRICT COURT OF AN ERRONEOUS JURY INSTRUCTION BY ORDER RATHER THAN NEW TRIAL WAS JUSTIFIED BY PRINCIPLES OF ISSUE PRECLUSION

In its final argument, Petitioner seeks to invoke the Constitution of the United States and the decisions of this court to reinstate a jury verdict obtained by virtue of an erroneous jury instruction offered and championed by the Petitioner. Perhaps only an organization so large and impersonal as the Petitioner could be so blind as to ignore fundamental principles of justice and fairness.

There is no support in *Dunn v. United States*, 284 U.S. 390 (1932) for the proposition that an incorrect jury instruction should be allowed to create a jury verdict legally inconsistent. The reasoning that the court cannot disturb a jury verdict because it cannot determine whose ox was gored simply does not apply. It was obvious to everyone that the defendants were on the gored end of this inconsistent jury verdict.

The *Dunn* rule upholding the issuance of inconsistent verdicts by a jury did not relate to a circumstance where the jury instructions were incorrect. *Dunn* did not contemplate that it would be the court's adoption of an incorrect jury instruction that would result in the inconsistent verdict. Juries are presumed to follow the instructions they are given. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604, 105 S.Ct. 2847, 2858, 86 L.Ed.2d 467 (1985). This jury is presumed to have followed their instructions. It is also apparent by their verdicts, that this jury did in fact follow their instructions.

The jury's lack of comfort with the result was apparent from their requests for clarification and errors in filling out the jury form. Given the circumstances, the District Court, in its quest for justice, had no other option than to correct the error occasioned by the jury instruction propounded by Petitioner and refuse to allow the verdict to stand.

Having determined the existence of the instructional error, the District Court was faced with the dilemma of how to remedy the error. Given that under the circumstances of this case, Petitioner is bound by the factual findings of the prior proceeding as to the existence of the affirmative defenses, a new trial would, by operation of principles of issue preclusion, result in a finding that Petitioner's claims were barred by the equitable defenses of laches, estoppel, acquiescence, and unclean hands. In other words, the result would be no different than the District Court's order.

CONCLUSION

Respondent PBS respectfully request that this court deny Petitioner's request for Writ of Certiorari.

Dated July 25, 1997

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